Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 29431
Docket No. MW-29477
92-3-90-3-412

The Third Division consisted of the regular members and in addition Referee Hugh G. Duffy when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Union Pacific Railroad Company

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned and/or otherwise allowed outside forces to construct an office addition to the mezzanine in the Diesel Shop in North Platte, Nebraska on May 1, 2, 3, 4, 5, 8, 9, 10, 11, 12, 15, 16, 17, 18, 19, 22, 23, 24, 25 and 26, 1989 (System File S-183/890630).

(2) The Agreement was further violated when the Carrier failed to give the General Chairman prior advance written notice of its plans to contract out the work involved here in accordance with Rule 52.

(3) As a consequence of Parts (1) and/or (2) above, Nebraska Division Group 3 B&B Carpenters D. M. Eckart and R. L. Sparks shall each be allowed one hundred sixty (160) hours of pay at their respective straight time rate."

FINDINGS:

The Third Division of the Adjustment Board upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

Between May 1 and May 26, 1989, outside forces constructed an addition to the mezzanine in the Carrier's diesel shop in North Platte, Nebraska. The Organization alleges that this work has customarily and traditionally been assigned to and performed by employees of Group 3 of the Nebraska Division Bridge and Building Subdepartment and that Carrier, without giving advance notice as required by Rule 52, allowed the work to be performed by the outside contracting force of North Platte Lumber Company.

The Carrier contends that it had no control over the disputed work, since the work area is leased by the General Electric Corporation, which contracted for and paid for the construction. It states further that due to the unavailability of manpower and the time element involved, the Carrier forces could not have performed this work had it been within their area of responsibility. It also states that a review of the payroll records shows that both Claimants were fully employed when the work was performed.

Rule 52 reads as follows:

"RULE 52. CONTRACTING

(a) By Agreement between the Company and the General Chairman work customarily performed by employees covered under this Agreement may be let to contractors and performed by contractors' forces. However, such work may only be contracted provided that special skills not possessed by the Company's employees, special equipment not owned by the Company, or special material available only when applied or installed through supplier, are required; or when work is such that the Company is not adequately equipped to handle the work, or when emergency time requirements exist which present undertakings not contemplated by the Agreement and beyond the capacity of the Company's forces. In the event the Company plans to contract out work because of one of the criteria described herein, it shall notify the General Chairman of the Organization in writing as far in advance of the date of the contracting transaction as is practicable and in any event not less than fifteen (15) days prior thereto, except in 'emergency time requirements' cases. If the General Chairman, or his representative, requests a meeting to discuss matters relating to the said contracting transaction, the designated representative of the Company shall promptly meet with him for that purpose. Said Company and Organization representative shall make a good faith attempt to reach an understanding concerning said contracting but if no understanding is reached the Company may nevertheless proceed with said contracting, and the Organization may file and progress claims in connection therewith.

(b) Nothing contained in this rule shall affect prior and existing rights and practices of either party in connection with contracting out. Its purpose is to require the Carrier to give advance notice and if requested, to meet with the General Chairman or his representative to discuss and if possible reach an understanding in connection therewith.

> (c) Nothing contained in this rule requires that notices be given, conferences be held or agreements reached with the General Chairman regarding the use of contractors or use of other than maintenance of way employees in the performance of work in emergencies such as wrecks, washouts, fires, earthquakes, landslides and similar disasters.
>
> (d) Nothing contained in this rule shall impair the Company's right to assign work not customarily performed by employes covered by this Agreement to outside contractors."

While the Carrier argues first that it would not in any event be required to furnish advance notice because the Organization has not demonstrated its exclusive rights to the work in question, this contention has been consistently rejected by the Board in a long line of cases. In Third Division Award 28622, the Board stated:

> "After consideration of this matter, it is our view that Third Division Award 28619, is dispositive of the instant case. Pursuant to Rule 52(a) the parties have agreed that 'work customarily performed by employees' can be contracted out in certain enumerated instances provided that the required advance notice is provided. Whether or not Carrier ultimately prevails on the merits of the dispute, it is our conclusion that it may not make a predetermination on the subject by ignoring the notice requirement when there is a valid or colorable disagreement as to whether the employees customarily performed the work at issue. That was our conclusion in Award 28619, as well as Third Division Awards 26174 and 23578."

The record in this case demonstrates a mixed practice on this property with respect to the work in question. It has been performed by members subject to the Agreement in the past but has also been contracted out by the Carrier in the past. Thus, while it could be contracted out under the provisions of Rule 52(b) and (d), the Carrier is required to give notice before doing so.

We turn then to the affirmative defense raised by the Carrier that it had no control over the disputed work. In determining whether the Carrier had control, we are guided by Third Division Award 28919, where the Board held that:

> "...where Carrier retained significant control or the right of approval over the manner in which the track was to be constructed, operated or maintained, the Agreement was violated when no advance notice of the work was given and the work was within the Scope of the Agreement."

The Carrier states that GE leases that portion of the building in question and it furnished a letter from the GE Service Manager stating that the facility in question is a GE-operated unit independent of the Carrier and that GE had contracted for and paid for the work.

The record developed on the property contains a letter from the General Chairman to the Carrier dated May 7, 1990 which states:

> "My notes from the April 4, 1990 conference indicate you agreed to furnish a copy of the lease agreement the Carrier purportedly has with the General Electric Company. Further you informed me that General Electric authorized and paid for completely the work in question, and that you would furnish the documents verifying same."

Despite two more written requests by the Organization, the Carrier did not furnish either a copy of the lease or the payment documentation.

Since the Carrier did not produce any of this documentation during the handling of the case on the property, we are unable to ascertain whether or not the Carrier retained significant control or the right of approval over how the new structure was to be constructed, operated or maintained. Since the Carrier has the burden of proving as an affirmative defense that it had no control over the disputed work (see Third Division Award 29017), we conclude that it has failed to carry its burden of proof and is in violation of the Agreement.

The only remaining issue is whether monetary damages should be awarded. The record is undisputed that Claimants were fully employed and suffered no monetary loss as a result of the action claimed. Accordingly, Paragraphs 1 and 2 of the Statement of Claim are sustained, but Paragraph 3, which requests a monetary remedy, is denied.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 21st day of October 1992.